### UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

FLEX FRAC LOGISTICS, L.L.C. and	§	
SILVER EAGLE LOGISTICS, L.L.C.,	§	
JOINT EMPLOYERS,	§	
Respondents,	§	Case 16-CA-27978
	§	
and	§	
	§	
KATHY LOPEZ,	§	
Charging Party.	§	•

# FLEX FRAC LOGISTICS, L.L.C. AND SILVER EAGLE LOGISTICS, L.L.C.'S BRIEF IN SUPPORT OF EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION

Flex Frac Logistics, L.L.C. and Silver Eagle Logistics, L.L.C. (collectively "Employer") file their Brief in Support of Exceptions to the Decision of the Administrative Law Judge, and would respectfully show the National Relations Board (the "Board") as follows:

### STATEMENT OF THE CASE

On or about October 13, 2011, this matter was tried before Administrative Law Judge Margaret G. Brakebucsh ("Administrative Law Judge Brakebusch"), during which evidence was presented. The General Counsel presented allegations on its charges that Employer violated Sections 7 and 8 of the National Labor Relations Act (the "Act") by maintaining a written rule prohibiting disclosure of confidential information, Employer terminated Kathy Lopez ("Lopez") from her employment for violating the confidential information provision. and Employer unlawfully interfered with, restrained, and coerced Lopez in the exercise of rights protected by Section 7 of the Act. Employer presented evidence that the termination of Lopez was for her violation of a confidentiality agreement prohibiting dissemination of confidential information to

members *outside* the organization and its confidential information provision was not in violation of the Act.

Administrative Law Judge Brakebusch determined that Lopez was terminated because of her disclosure of confidential information about contracts rates paid to Employer by its customers and not because of any discussions that Lopez may have had about employees;' wages or for any other discussion about wages and not because of involvement of activity protected under the Act. However, Administrative Law Judge Brakebusch further determined that Employer's confidential information provision was in violation of Sections 7 and 8 of the Act even though she stated that she had no doubt the confidentiality agreement was likely written to prohibit confidential disclosures other than wages or other terms of employment. As a result, Administrative Law Judge Brakebusch determined that Employer's confidential disclosure provision violated the Act and Employer terminated Lopez pursuant to the confidentiality provision and therefore violated the Act.

### II. ISSUE PRESENTED

Based upon the findings by Administrative Law Judge Brakebusch, Employer excepts to the Administrative Law Judge's ruling that its confidential disclosure provision violates Sections 7 or 8 of the Act and that it violated the Act by terminating Lopez. As such, Employer presents the issue regarding its confidential disclosure provision and the subsequent termination of Lopez. Employer's exceptions, incorporated herein, all relate to this issue presented to the Board.

Employer refers to the Administrative Law Judge Brakebusch's Decision as AD\_\_\_\_; Tr. \_\_\_\_ refers to pages in the official hearing; and GC Ex refers to the exhibits submitted by the General Counsel.

A.D. 11:45.

### III. SUMMARY OF POSITION

Employer's "confidentiality" provision neither refers to wages nor can it be reasonably read to prohibit the discussion of wages by its employees. Rather, the provision prohibits the disclosure of Employer's confidential information (such as the terms of its contracts with its customers) outside the organization. Obviously such a provision is commonly used in the ordinary course of business to prevent the dissemination of proprietary and confidential business information to those outside the company, including competitors, to protect a competitive advantage.

Employer terminated Ms. Lopez, an at-will employee, because the Employer believed that she was disclosing Employer's confidential information -- specifically the terms of Employer's contracts with its customers -- to individuals outside the organization and because she was disruptive within the workplace. The Employer's termination of Ms. Lopez did not violate Sections 7 or 8 of the Act.

### IV. BACKGROUND

Employer is a Fort Worth, Texas based trucking company that delivers frac sand to oil and gas well sites for companies.<sup>2</sup> Fred Funk, the President and Chief Executive Officer, makes the decisions for Employer.<sup>3</sup> Since 2006, he has grown the company from just several employees and two trucks to a company that now employs approximately 150 individuals, 100 of

AD 2 39-40

<sup>&</sup>lt;sup>2</sup> AD 3 15

which are drivers employed by Employer.<sup>4</sup> There are another 100 drivers that are independent contractors and also provide services for Employer.<sup>5</sup>

As part of its business practice, Employer contracts with its customers to haul loads of frac sand for certain rates.<sup>6</sup> These contract rates are confidential and are not known outside the company.<sup>7</sup> It would be harmful to Employer's competitive advantage and its business if its contract rates with its customers were to get outside the company.<sup>8</sup> In fact, within the company, only management and certain account staff are privy to this information.<sup>9</sup> As Mr. Funk testified:

- A. Again, my fear was what was going out to our contractor group, what was going out, what was being said outside our company . . . and I believe I heard testimony that truck drivers could go out and start hauling our same companies, just start handling. If they had such information, it's pretty lethal.
- Q. How could that information harm the company?
- A. If they go in and say, hey, we know you're paying this with Flex Frac (Employer), and we'll do it for this . . . If Coca-Cola knows what Pepsi's paying for their product, they can always go and underbid it, so they can always go in and underbid what we do, and wipe away years of work. 10

Even Ms. Lopez readily admitted and confirmed that if Employer's contract rates with its customers were disclosed to third parties, the Employer can be harmed.<sup>11</sup>

While Employer's contract rates with its customers are confidential, the rates that Employer pays its drivers (employee drivers and independent contract drivers) are set and known by all.<sup>12</sup> The drivers are paid a set rate that typically involves a rate per mile and demurage

5 AD 3 15-19

<sup>&</sup>lt;sup>4</sup> AD 3 15-19

<sup>6</sup> AD 3 21-30

<sup>&</sup>lt;sup>7</sup> AD 3 30-31

<sup>8</sup> AD 5 6-10

<sup>&</sup>lt;sup>9</sup> Tr<sup>-</sup> 66-67. 69 71-72. Tr 169

<sup>&</sup>lt;sup>10</sup> Tr 258

<sup>11</sup> Tr: 225-26

<sup>&</sup>lt;sup>12</sup> AD 5 6-10. AD 4 26-29

time.<sup>13</sup> Such rate is not dependent on the Employer's contract rate with its customers.<sup>14</sup> In fact, the employee driver pay is openly discussed within the office and even promoted by management when drivers have big paychecks.<sup>15</sup> As such, the driver pay rates are known and openly discussed within the business.

Kathy Lopez was hired in May, 2010 to work in Employer's accounting department.<sup>16</sup> She was an at-will employee.<sup>17</sup> The employment document signed by Ms. Lopez describes her employment as at-will, discusses termination, and also contains the "confidentiality" provision at issue, which states:

#### **Confidential Information**

Employees deal with and have access to information that must stay within the Organization. Confidential Information includes, but is not limited to, information that is related to: our customers, suppliers, distributors; Silver Eagle Logistics LLC organization management and marketing processes, plans and ideas, processes and plans; our financial information, including costs, prices; current and future business plans, our computer and software systems and processes; personnel information and documents, and our logos, and art work. No employee is permitted to share this Confidential Information outside the organization, or to remove or make copies of any Silver Eagle Logistics LLC records, reports or documents in any form, without prior management approval. Disclosure of Confidential Information could lead to termination, as well as other possible legal action.<sup>18</sup>

## V. ARGUMENT

Employer's confidential disclosure provision does not violate the Act as written, protects a legitimate business purpose, and has not been enforced to prevent the discussion of employees' conditions of employment. If a rule does not explicitly violate Section 7 activity, it will only

<sup>&</sup>lt;sup>13</sup> AD 3 20-30

<sup>&</sup>lt;sup>15</sup> AD 4 26-29

<sup>&</sup>lt;sup>16</sup> AD 7 2

<sup>17</sup> GC Ex 2

<sup>&</sup>lt;sup>18</sup> AD 4, 1-14

violate Section 8(a)(1) upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rules has been applied to restrict the exercise of Section 7 rights.<sup>19</sup> There is not sufficient evidence to support any three of the required criteria to hold that Employer's confidential disclosure provision violates the Act.

Another critical part of the analysis of a confidential disclosure provision is whether there is evidence of a legitimate business purpose. In this case, there is sufficient evidence provided by testimony presented at the hearing establishing that the purpose of the confidential disclosure provision was to protect Employer's contract rates with its customers and maintain a competitive advantage in its business. In *Lafayette Park Hotel*, the Board determined that a conduct provision which prevented divulging of hotel-private information did not violate the Act.<sup>20</sup> The Board noted that businesses clearly have a substantial and legitimate interest in maintaining the confidentiality of private information, including guest information, trade secrets, contracts with suppliers, and a range of other proprietary information.<sup>21</sup> Likewise, in *International Business Machines Corporation*, the Board used the "legitimate business purpose" analysis and upheld the Administrative Law Judge's findings and dismissal of the complaint as there was a substantial and legitimate business justification for the policy.<sup>22</sup>

Similarly, in *K-Mart d/b/a Super K-Mart*, the Board found that a confidentiality provision prohibiting disclosure of company business documents because they were confidential did not

<sup>2222</sup> 265 NLRB 638 (1982).

<sup>&</sup>lt;sup>19</sup> Cintus Corporation and Union of Needletrades, Industrial and Textile Employees, 344 N.L.R.B. 943, 2005 NLRB LEXIS 309 \*3 (2005) (citing Lutheran Heritage Village-Livonia, 343 NLRB No. 75, slip op. at 2 (2004)).

<sup>&</sup>lt;sup>20</sup> 326 N.L.R.B. 824; 1998 NLRB LEXIS \*12-13 (1998).

<sup>&</sup>lt;sup>21</sup> Lafayette Park Hotel. 326 N.L.R.B. 824; 1998 NLRB LEXIS \*12-13 (1998).

violate the Act.<sup>23</sup> In that case, the Board noted that employees would reasonably understand that the confidential disclosure provision at issue was designed to protect the legitimate interest of the employer and to protect the confidentiality of private business information rather than to prohibit discussion of wages.<sup>24</sup> Moreover, the Board noted that the confidential provision had not been enforced to prohibit employees from discussing their terms and conditions of employment reinforced that understanding.<sup>25</sup>

In addition, in *Mediaone of Greater Florida, Inc.*, the Board found that a confidentiality provision did not violate the Act even when it prevented disclosure of employee information because it reads as prohibiting only disclosure of the employer's proprietary information when read as a whole.<sup>26</sup> Furthermore, the Board in *Mediaone* found that there was no evidence that the employer enforced the rule against employees for engaging in Section 7 activity or that the rule was promulgated in response to union or protected activity.<sup>27</sup>

Although, in *Cintas Corporation*, the confidentiality provision which limited employees from discussion employee information with anyone outside the company violated the Act; <sup>28</sup> the Administrative Law Judge found it germane that the respondent failed to present any legitimate business purpose for the employee prohibitions contained in the manual.<sup>29</sup> Whereas in this case, there is substantial evidence that the confidential disclosure provision at issue was meant to and enforced to protect disclosure of proprietary business information to individuals *outside* of the

<sup>&</sup>lt;sup>23</sup> 330 N.L.R.B. 263; 1999 NLRB LEXIS 838 \*2 (1999).

<sup>&</sup>lt;sup>24</sup> 330 N.L.R.B. 263; 1999 NLRB LEXIS 838 \*4 (1999).

<sup>&</sup>lt;sup>25</sup> 330 N.L.R.B. 263; 1999 NLRB LEXIS 838 \*4 (1999).

 $<sup>^{26}</sup>$  340 N.L.R.B. 277; 2003 NLRB LEXIS \* 3, 7, and 8-10 (2003).

<sup>&</sup>lt;sup>27</sup> Mediaone of Greater Florida, Inc., 340 N.L.R.B. 277; 2003 NLRB LEXIS \* 12 (2003).

<sup>&</sup>lt;sup>28</sup> Northern Distribution, Inc., 2002 NLRB LEXIS 192 \*5 and 14 (2002).

<sup>&</sup>lt;sup>29</sup> Cintas Corporation and Union of Needletrades, Industrial and Textile Employees. 344 N.L.R.B 943, 2005 NLRB LEXIS 309 \*17 (2005).

company to safeguard Employer's competitive advantage to win and obtain bids with its customers.

The "confidentiality" provision at issue in no way precludes employees from conferring with respect to matters directly pertaining to the employees' terms and conditions of employment. Additionally, the provision cannot reasonably be read as a rule prohibiting discussions of wages or working conditions among the employees. In fact, employee Catherine Chambers testified that Employer had never given her anything in writing that said she could not discuss wages and management never told her she could not talk about wages.<sup>30</sup>

Obviously, businesses have a substantial and legitimate interest in maintaining the confidentiality of company information from third parties. Employees reasonably would understand that the "confidentiality" provision is designed to protect that interest rather than to prohibit the discussion of their wages.<sup>31</sup> Ms. Lopez herself even acknowledged that the disclosure of Employer's contract rates with its customers, to third parties, would be harmful to Employer.<sup>32</sup> Further, Mr. Funk also testified to the great harm the disclosure would cause Employer.<sup>33</sup>

The "confidentiality" provision does not even mention wages at all, much less prohibit employees from discussing them. In point of fact, the provision specifically relates to the disclosure of Employer's confidential information to parties outside the organization, stating in part:

"Employees deal with and have access to information that must stay within the organization"

<sup>&</sup>lt;sup>31</sup> See Lafayene Park Hotel. 326 NLRB 824, 1998 NLRB Lexis 12-13 (1998). K-Mart d b a Super K-Mart. 330 NLRB, 1999 NLRB Lexis 838\*2. (1999). Mediaone of Greater Florida. Inc. 340 NLRB 227, 2003 NLRB Lexis 3-7 and 8-10 (2003)

<sup>&</sup>lt;sup>2</sup> Tr 225-26

<sup>33</sup> Tr 43 258

and

"No employee is permitted to share this Confidential Information outside the organization . . . ."

In summary, the "confidentiality" provision does not prohibit the discussion of wages.

Moreover, the undisputed evidence presented at the hearing showed that:

- There is no Employer policy prohibiting employees from discussing wages;<sup>34</sup>
- There is nothing in writing from Employer prohibiting employees from discussing wages;<sup>35</sup>
- Employer has not verbally told the employees that they cannot discuss wages; <sup>36</sup> and .
- There has not been any termination based on an employee discussing wages.

As such, Employer's confidential disclosure provision does not violate the Act as written.

### VI. CONCLUSION

WHEREFORE, Employer Flex Frac Logistics, L.L.C. and Silver Eagle Logistics, L.L.C. submits that the record does not support the Administrative Law Judge Brakebusch's finding that Flex Frac Logistics, L.L.C. and Silver Eagle Logistics, L.L.C.'s confidential provision violations sections 7 and 8 of the National Labor Relations Act or that the termination of Kathy Lopez violated sections 7 or 8 of the National Labor Relations Act. Employer request that the Board grant its Exceptions to Administrative Law Judge Brakebusch's Decision, any finding of a violation of the Act based thereon should be reversed and not affirmed by the Board, and find that there was not a violation of the Act.

38 Fr 50, 68, 108, 192, and 236

ч Tr 50-51, 68

<sup>&</sup>lt;sup>36</sup> Tr 108 and 192. While Lopez threw out that a previous manager commented that wages should not be discussed, she did not substantiate such or rely on such comment in her claim. Fr 199

Respectfully submitted.

Scott E. Hayes

State Bar No. 09280050

VINCENT LOPEZ SERAFINO JENEVEIN, P.C.

1601 Elm Street, Suite 4100

Dallas, Texas 75201

(214) 979-7400 - Telephone

(214) 979-7402 - Telecopier

ATTORNEY FOR FLEX FRAC LOGISTICS, L.L.C. and SILVER EAGLE LOGISTICS, L.L.C.

#### **CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing instrument has been forwarded to the following, via email and certified mail, return receipt requested, on this the 2<sup>nd</sup> day of March, 2012:

Erica L. Berencsi National Labor Relations Board, Region 16 Federal Office Building 819 Taylor Street, Room 8A24 Fort Worth, TX 76102

Scott E. Haves

ORDER SECTION

TI:IIMA Z- SAM SIOS

UECEINED

From: (214) 979-7400

Scott Hayes Vincent Lopez Serafino & Jenevein 1601 Elm Street, Suite 4100

Dallas, TX 75201

Origin ID: RBDA



J12101112190225

SHIP TO: (202) 208-3000

**BILL SENDER** 

Office of the Executive Secretary National Labor Relations Board 1099 14th Street, NW

Washington, DC 20570

Ship Date: 02MAR12
ActWgt 0.5 LB
CAD: 7517280/INET3250

Delivery Address Bar Code

000581-00005



Ref# Invoice#

PO# Dept#

MON - 05 MAR A1 PRIORITY OVERNIGHT

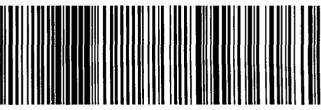
TRK# 0201 7981 2750 7028

20570 DC-US

DCA







512G1/81D5/A278

#### After printing this label:

- 1. Use the 'Print' button on this page to print your label to your laser or inkjet printer.
- 2. Fold the printed page along the horizontal line.
- 3. Place label in shipping pouch and affix it to your shipment so that the barcode portion of the label can be read and scanned

Warning: Use only the printed original label for shipping. Using a photocopy of this label for shipping purposes is fraudulent and could result in additional billing charges, along with the cancellation of your FedEx account number

Use of this system constitutes your agreement to the service conditions in the current FedEx Service Guide, available on fedex.com.FedEx will not be responsible for any claim in excess of \$100 per package, whether the result of loss, damage, delay, non-delivery,misdelivery,or misinformation, unless you declare a higher value, pay an additional charge, document your actual loss and file a timely claim.Limitations found in the current FedEx Service Guide apply. Your right to recover from FedEx for any loss, including intrinsic value of the package, loss of sales, income interest, profit, attorney's fees, costs, and other forms of damage whether direct, incidental,consequential, or special is limited to the greater of \$100 or the authorized declared value Recovery cannot exceed actual documented loss.Maximum for items of extraordinary value is \$500, e.g. jewelry, precious metals, negotiable instruments and other items listed in our ServiceGuide. Written claims must be filed within strict time limits, see current FedEx Service Guide.

ORDER SECTION

31:11 MA Z- AAM S10S

MARIONE